No. 11,925

IN THE

United States Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY, a corporation,
Appellant,

vs.

WAR DAMAGE CORPORATION, a corporation,
Appellee.

APPELLANT'S REPLY BRIEF

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I. THE LOSS OF THE LAHAINA WAS WITHIN THE STATUTE

A. The Loss of the Lahaina Falls Within the Plain Meaning of the Statute.

As its principal contention on the central question in this appeal, plaintiff asserted in its opening brief (pp. 7-11), that Section 5g of the Reconstruction Finance Corporation Act, by its plain language, covered the loss of the Lahaina.

That contention of plaintiff stands unchallenged. Defendant's brief makes no contention that the literal meaning of the statute excluded from its protection ships as contrasted with other forms of property.

Defendant asserts, however, that the law must be deemed to have a meaning different from its normal and natural mean-

ing, because of an alleged usage current in certain marine insurance policies and practices (Def. Br., pp. 43-50). This contention is made despite assurance by the defendant elsewhere in its brief (pp. 8, 32) that the Act had nothing to do with marine affairs. Having anticipated this contention of the defendant (Op. Br., pp. 12-17) it is unnecessary to demonstrate again its lack of merit. Moreover, the form of the "in transit" clause as originally adopted completely refutes defendant's argument that the language was used in any technical sense. The clause was added by the Clark Amendment (Sen. Com. Hearings, p. 73) which simply inserted the words "or in transit between" so that the bill read:

> "Such protection shall be limited to property situated in OR IN TRANSIT BETWEEN the United States, etc."

Plainly the property to be covered "in transit" was identical with the property to be covered while situated in the United States.

Defendant also argued (Def. Br., p. 41) that the statute covers only such property as defendant failed to exclude under its alleged power to make "general exceptions." Actually that assertion has no bearing on the meaning of the phrase "property in transit." Whether the defendant had power to exclude ships and did so is discussed elsewhere. But the existence or non-existence of that power has no bearing on the interpretation of the statute.

B. There Is No Occasion for Resort to Legislative History.

Although defendant does not challenge plaintiff's assertion that the statute by its plain meaning applies to ships as well as cargo or other personal property, it asserts that even in the face of clear and unambiguous language, legislative history will be resorted to to determine whether Congress intended the literal meaning.

Defendant offers no answer to our claim that the Supreme Court has halted unrestrained use of legislative materials.

Packard Company v. Labor Board (1947) 330 U.S. 485, 91 L.Ed. 1014, 67 S.Ct. 789, except to state that the dissenting justices relied on such materials.

Defendant simply ignores the rule laid down in *Barr v. United States,* 324 U.S. 83, 89 L.Ed. 765, 65 S.Ct. 522 (Op. Br., p. 19) where the court said:

> "But if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators. *Puerto Rico v. Shell Co.,* 302 U.S. 253, 257; *Browder v. United States,* 312 U.S. 335, 339, and cases cited." (p. 90)

Clearly then, even if the chief purpose of the "in transit" provision of the law was to cover cargoes, even if Congress never contemplated the application to the law to ships, that would not suffice to alter or restrict the plain meaning of the statute.

Ignoring these rules, the application of which disposes of this controversy, defendant plunges into the legislative history of the statute.

C. The Legislative History Shows No Intention to Exclude Ships; on the Contrary Ships Were Consciously Included.

We asserted that nothing in the legislative history showed that *anyone* wanted to exclude ships or to treat them differently than cargoes.

Defendant has sifted the legislative materials with a fine comb but has produced not a single statement to indicate that anyone wanted to exclude ships. All that defendant has been able to do is to marshal a long array of statements about cargo protection. As we have noted above, that is not enough to restrict the application of the law.

In a detailed summary of legislative history set forth in plaintiff's opening brief, we showed that it was consonant with the

basic purpose of the law to protect ships as well as other forms of property. We quoted numerous statements by witnesses, members of the Congressional Committee considering the bill, floor managers and Congressmen, indicating either an understanding that the bill was all-inclusive or specifically showing the purpose and intent of protecting ships.

Defendant has chosen to ignore many of these remarks and to explain others by imputing to the speakers an intent contrary to what they said. But for the most part defendant has confined its attention to statements which refer to cargoes, merchandise or other forms of property embraced within the protection of the statute, on the theory, apparently, that by proving an intent to cover these specific properties the plain meaning of the statute will shrink enough to exclude ships.

Defendant completely ignores the form of the Clark Amendment which, by merely adding the words "or in transit between," showed plainly that the "property" protected while in transit was identical with the "property" protected while in the United States (Op. Br., p. 37).

Defendant explains Senator Clark's explanation of the amendment:

> "That would merely remove the limitation, so that you could go into this question of *shipping*" (Sen. Com. Hearings, p. 73)

by arguing that "shipping" did not include vessels in Senator Clark's mind (Def. Br., p. 18). Here defendant draws not upon the record, but instead imputes to the Senator an intention contrary to his own words.

Other quotations from the proceedings in the Senate Committee showing an intention to duplicate Maritime Commission functions, and thus to protect ships as well as cargoes, are ignored by defendant (Op. Br., pp. 39, 41).

Again, the statement of Senator Maloney, in introducing the bill to the Senate, that it goes all of the way in providing protection against enemy attack for the tangible property of Americans (Op. Br., p. 42) is ignored, as are other statements asserting an all-inclusive coverage (Op. Br., pp. 33, 46, 47).

Defendant attempts to explain the explicit statement of Mr. Steagall, Committee chairman, while explaining the bill to the House (Op. Br., pp. 45-48). Mr. Steagall replied to a question of Mr. White whether the bill applied to cargoes and *ships* and flatly answered "Yes, under certain conditions" (88 Cong. Rec. 1847). Defendant assures the court that Mr. Steagall replied "hastily" and that he "obviously was not sure of his grounds." (Def. Br., p. 27).

Nothing in the Congressional Record supports this assertion that Mr. Steagall was hasty in his reply or not sure of his grounds.

Defendant attempts to explain this categorical statement that the Act gave protection to ships by explaining that Mr. Steagall referred Mr. White's question to Mr. Bland, who added the information that such matters were being taken care of under an amendment to the Maritime Commission's authority. That answer of Mr. Bland, instead of being the equivalent of a denial that defendant could cover vessels, as defendant suggests, is in fact but a part of his discussion ending by Mr. Bland's statement that *"if there should be a case which is not covered by the maritime insurance legislation then this takes care of that."* Mr. Steagall added: *"That is quite correct."*

These remarks of Mr. Steagall and Mr. Bland plainly show that the War Damage law covered every type of property that the Maritime Commission could cover and perhaps more. The Maritime Commission was authorized to insure both cargoes and vessels and hence defendant was authorized to do so, except

for the proviso in the bill as it existed at that time, prohibiting defendant from covering anything which the Maritime Commission could insure. But any marine risk, including ships not within the authority of the Maritime Commission, would be covered by the defendant.

In conference, the proviso that defendant could not insure what the Maritime Commission could insure was amended to be effective only when the paid program thereafter became effective. In other words, during the free period, the defendant had authority to insure whatever the Maritime Commission could insure, including ships.

After conference, Mr. Steagall answered flatly: "Yes," to the question of Mr. Smith:

> "Under the temporary arrangement until the contracts are written, say July 1, are the *sinkings* that are taking place at the present time covered by the temporary arrangement?" (88 Cong. Rec. 2658)

Again defendant undertakes to look into the minds of Mr. Smith and Mr. Steagall and declare that they contemplated cargo only. Actually Mr. Smith, who propounded the question, elaborated upon what he meant when he asked his next question:

"This takes care of the *property* alone?"

Mr. Steagall replied, quite clearly:

"The property entirely."

Later in the proceedings, Mr. Smith again inquired about "sinkings" pointing out that since the committee hearings, there had been an *"immense amount of sinkings"* and inquiring about the propriety of giving free protection. Mr. Steagall replied that the matter was closed (88 Cong. Rec. 2660-2661).

Defendant says that the answer is ambiguous. Assuming it to be ambiguous, how could that fact justify a departure from the plain meaning of the statute? Furthermore, defendant's

argument that "sinkings" refers to cargo and not to ships, is inconsistent with its argument that Congress well knew that the largest losses then suffered were the losses of ships. In light of this knowledge, Mr. Smith's concern over the "immense amount of sinkings" would hardly refer to cargo only. Plainly, he and the others in Congress had in mind the large vessel losses already sustained.

D. Miscellaneous Agreements Advanced by Defendant.

1. THAT DEFENDANT WAS NOT INTENDED TO COVER WHAT THE MARITIME COMMISSION WAS AUTHORIZED TO COVER.

Defendant concedes that this statute covered at least some property, e.g. cargo, which the Maritime Commission was authorized to cover. In that concession defendant abandons the whole basis upon which the District Judge based his Opinion (Op. Br., p. 50). Defendant argues, however, that Congress was reluctant to duplicate functions and hence that the "in transit" coverage must be restricted in some way. Why the line should be drawn at ships is not indicated. At any rate, both the language of the statute and the legislative history show the duplication during the free period to be complete.

2. THAT THE STATUTE SHOULD BE INTERPRETED ON THE ASSUMPTION THAT CONGRESS WAS IGNORANT OF THE LAW.

In our Opening Brief (p. 53), we referred to the trial judge's misconception of the scope of the law as induced by the erroneous assumption that shippers of cargo to Hawaii and Alaska could not determine in advance whether their goods would be carried in American or foreign bottoms and that the "in transit" clause was prompted solely by the need to cover cargo in foreign bottoms.

Defendant asserts that Congress acted upon the same erroneous assumption and that the law must be construed in the light of their ignorance (Def. Br., p. 34). We do not share

defendant's skepticism about the knowledge of members of Congress. The only person who appears to have been confused in the hearings was Mr. Hamilton, counsel for the R. F. C. The laws excluding foreign flag vessels from the domestic trade have been a basic part of our policy for generations. Will it be supposed that the members of Congress, even the members of the Committees on Merchant Marine and Fisheries and Commerce were all ignorant of laws so long in effect?

We know of no rule of statutory construction that will impart to a law a meaning inconsistent with its words on the ground that Congress acted in ignorance of its own laws and was misled thereby.

3. THAT FAILURE OF OTHER SHIPOWNERS TO PRESENT A CLAIM SHOWS THAT EVERYONE UNDERSTOOD VESSELS WERE NOT COVERED.

Defendant argues that it is common knowledge that large numbers of ships were sunk by enemy action during the free period for which claims would have been presented if plaintiff's claim had any merit (Def. Br., p. 5).

This is neither a matter of knowledge nor record. We have no idea how many ships were sunk by enemy action during the free period. We have no idea how many of them were en route between two protected points, nor how many of them had not yet been taken over by the government.

We point out, however, that any prudent shipowner, once war had actually broken out, would have obtained war risk insurance from some source at some price or would not permit his ship to sail.

The press releases did not cover ships on the high seas and this statute was not enacted until March 27, 1942. Except for those vessels like the Lahaina, which were caught en route by the outbreak of war, we think it a safe guess that within a few days after the war began, shipowners either obtained war risk insurance or did not sail.

The absence of any substantial number of claims thus appears perfectly reasonable and is no ground for any inference about the merits of plaintiff's claim.

4. THAT AN INTERPRETATION OF THE STATUTE TO INCLUDE SHIPS WOULD LEAD TO ABSURD RESULTS.

In our Opening Brief (pp. 54-55) we asserted that an interpretation of the statute to *exclude* vessels would be irrational and discriminatory. Defendant replied by asserting that to *include* vessels would be absurd (Def. Br., p. 34).

Seemingly, defendant contends that it would be discriminatory and absurd for Congress to protect ships en route to a possession but not to protect a ship en route elsewhere.

The short answer is that that is exactly what Congress admittedly did with respect to cargo. We claim only that the vessel is entitled to protection to the same extent as the cargo. We are unable to see how defendant, charged by Congress with administering the law, can be heard to assert that it would be irrational, discriminatory and absurd for Congress to do with vessels as it did with cargoes.

5. THAT DEFENDANT'S INTERPRETATION OF THE STATUTE IS ENTITLED TO WEIGHT.

Defendant asserts that the interpretation of a statute, made contemporaneously with its enactment, by the agency charged with its administration, is entitled to persuasive force (Def. Br., p. 38).

That rule is well settled, although it is subject to some qualifications not mentioned by defendant.

Aside from the caption, however, defendant neglects to state what the interpretation was, when and how it was made, or any other information about it. From the caption it may be inferred that defendant interprets the statute as not including ships. This action would have been sufficient evidence of that.

It is difficult to imagine how there could be any sort of administrative practice about ships since defendant asserts that only two other claims were made (Def. Br., p. 5).

Such vague assertions, unsupported by any facts, are not entitled to any weight at all.

II. THE FREE PROTECTION IS MANDATORY

Defendant makes the bold argument that it was *authorized* but not *required* to compensate for losses incurred during the free period (Def. Br., p. 67). This argument is based on the language of subsection (b) that loss or damage prior to the effective date of the paid program

> "may be compensated by the War Damage Corporation without requiring a contract of insurance or the payment of premium or other charge, and such loss or damage may be adjusted as if a policy covering such property was in fact in force at the time of such damage."

Use of the word "may," defendant argues, shows that Congress intended to leave the matter to defendant's discretion.

A. The Question of the Form of Plaintiff's Remedy.

Defendant apparently was somewhat abashed by the implications of the proposition for which it contends, namely, that Congress had turned over to Mr. Jesse Jones one billion dollars with which to compensate such losses as he saw fit without even the pretense of any standard to guide his actions. Considering the mere potential of abuse of power any such interpretation would seem difficult to maintain.

Defendant seeks to make its position more plausible by asserting that its discretion was not entirely uncontrolled—that a person whose claim was unreasonably rejected would have a remedy in a writ in the nature of a Writ of Mandamus.

We are certain that defendant has unreasonably rejected plaintiff's claim. If a Writ of Mandate is the appropriate remedy it may, of course, be given in this action regardless of the form of relief asked for in the complaint. Rule 54(c) Fed. Rules of Civ. Proc.

We are unable to understand the precise nature of the discretion which defendant claims under this statute. It is well settled in the Federal Courts that the Writ of Mandate does not issue to control the exercise of a discretionary power, but rather, is confined to enforcing the performance of a plain and unmistakable duty. *United States ex rel Girard Co. v. Helvering* 301 U.S. 540, 543, 81 L.Ed. 1272, 57 S.Ct. 855; *Wilbur v. United States ex rel Kadrie,* 281 U.S. 206, 218-219, 74 L.Ed. 809, 50 S.Ct. 320.

Defendant's assertion that a Writ of Mandate may issue is a concession that the duty to compensate losses incurred during the free period is something more than a mere permissive authorization. If a Writ of Mandate may issue it can only be on the theory that defendant has a plain duty to compensate the loss. We think that defendant does have such a plain duty to compensate any losses within the scope of the statute. In this case, however, there is no need for a Writ of Mandate. The writ is an extraordinary remedy to be issued only when the traditional forms of relief do not afford an adequate remedy. *United States ex rel Girard Co. v. Helvering,* supra, at 544. A monetary judgment is an adequate remedy in the present case.

B. The Statute on Its Face Imposes a Mandatory Obligation to Compensate Losses During the Free Period.

A fair reading of the whole statute shows that the obligation to compensate losses incurred during the free period was intended by Congress to be mandatory.

1. THE WORD "MAY" IS A TERM OF ART. WHEN USED IN A STATUTE ADDRESSED TO A PUBLIC AGENCY IT ORDINARILY IS UNDERSTOOD TO BE MANDATORY.

The meaning of such words as "may" and "shall" in statutes has been the subject of a vast amount of litigation. The word "may" is inherently ambiguous, and draws its meaning from the context in which it is used. A well-settled rule has developed that when the word "may" appears in a statute addressed to a public officer, authorizing him to do an act for the benefit of a particular person or class, it ordinarily will be considered as *requiring* instead of simply *permitting* the action referred to.

On this point we place particular reliance upon *United States Sugar Equalization Board, Inc. v. De Ronde & Co.* (3 Cir.) 7 F.2d 981, cert. gr. 269 U.S. 548, dismissed by stipulation 271 U. S. 691. Other cases to the same effect are: *Supervisors v. United States,* 4 Wall. (71 U.S.) 435, 446-447, 18 L.Ed. 419; *Mason v. Fearson,* 9 How. (50 U.S.) 248, 258, 13 L.Ed. 125; *Chase v. United States* (8 Cir.), 261 Fed. 833, 837; *Parish v. MacVeagh,* 214 U.S. 124, 53 L.Ed. 936, 29 S.Ct. 556; *United States v. Cornell Steamboat Co.,* 202 U.S. 184, 50 L.Ed. 987, 26 S.Ct. 648.

The rationale of these cases is that the true interpretation of a statute depends upon the intent of Congress. When Congress authorizes a public agency to do an act for the benefit of some particular class, it is understood that in the ordinary course of things Congress does not intend to leave it to the agency's discretion; it intends that the act be done. *Supervisors v. United States, supra.*

But we do not rely only on this guide to Congressional intent. Other provisions in the Act, and the legislative history, show that Congress never intended to leave this matter of protection for the public against the risks of war to defendant's whim.

2. FREE PROTECTION CLAIMANTS WERE GIVEN THE SAME RIGHTS AS CONTRACT CLAIMANTS.

Defendant overlooks the closing words of subsection (b) stating that

> "such loss or damage may be adjusted as if a policy covering such property was in fact in force at the time of such damage."

By this language Congress obviously intended to place the free protection claimants on the same basis as policy holders under the paid protection plan. As between defendant and the claimants under the free protection, the rights and liabilities were to be measured *"as if"* a contract existed. Defendant does not suggest that there was anything discretionary or permissive about the obligation to make payments where its contracts were in force. Inasmuch as Congress has placed the free protection claimants in the same status, so far as their rights against defendant are concerned, defendant is in no position to assert that it is not obligated to make the payment.

3. THE PROVISIONS OF SUBSECTION (a) REVEAL THAT FREE PROTECTION WAS NOT DISCRETIONARY.

Defendant overlooks the fact that subsection (b) is not the only portion of the statute applicable to free protection. Subsection (a) also contains a direction to the defendant to compensate during the free period.

Subsection (a) directs defendant to provide protection against loss or damage "which *may result* from enemy attack." The statute was enacted March 27, 1942. The free period did not end until July 1, 1942. It is apparent that the direction in subsection (a) is applicable to at least part of the free period.

Defendant does not argue that the direction to compensate given in subsection (a) is merely permissive or discretionary. Instead defendant asserts that subsection (a) was mandatory

in distinction to subsection (b), which it claims to be permissive. The result is that if defendant's argument is accepted, free protection from December 6 to March 27 is permissive and discretionary, but free protection from March 27 to July 1 is mandatory. Certainly, there is no reason to suggest that defendant's obligation with respect to the free coverage is different in one period than in another. There is not the slightest hint in the legislative history of any such distinction, nor can any reasonable basis for such a distinction be maintained.

Subsection (b), which applies to the *entire* free period, thus cannot have been intended to make defendant's obligation to compensate during this whole period discretionary.

C. The Legislative History Indicates That Congress Did Not Intend to Leave Payment to the Defendant's Discretion.

1. DEFENDANT WAS ALREADY OBLIGATED UNDER THE PRESS RELEASES TO COMPENSATE LOSSES OCCURRING WITHIN THE UNITED STATES.

Before Congress even considered the bill which became Section 5(g), defendant had already issued two press releases promising compensation for loss or damage to various properties in the United States (Op. Br., p. 24).

Nothing in the press releases hints that defendant's obligations were merely discretionary. Certainly Mr. Jones gave no such hint to Congress when he informed the Committees that everybody was already covered, and certainly they accepted his statements that the defendant had already issued a "blanket insurance policy,"* and that "Everybody now is reasonably covered by the $100,000,000 provided."† To speak of an obligation in terms of an insurance policy is not to suggest any element of discretion with respect to the obligation to pay if the loss described should be incurred.

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*See Sen. Com. Hearings, pp. 6-7.

†id., p. 8; House Com. Hearings, p. 26.

Is there any reason to assume that Congress intended to cut down these existing rights? Defendant has suggested none and we know of no basis upon which such an argument could be made. Yet the provisions of subsection (b) completely overlap the coverage provided by the press releases and go beyond it in expanding the kinds of property covered and adding the "in transit" provision. Certainly, Congress did not lessen rights already created by an Act which, on its face, expanded those rights.

2. FROM THE OUTSET FREE PROTECTION WAS RECOGNIZED AS MANDATORY.

The original bill was prospective only. It contemplated the issuance policies of insurance on payment of a premium. In the Senate Committee the bill was amended to provide free protection up to a limit of $15,000. It was understood that, for the first time, coverage under the bill had become mandatory to this limit, while for coverage beyond that amount, defendant retained a measure of discretion in deciding whether or not to enter into any particular contract of insurance. The discussion in the Committee is specific on this point (see Sen. Com. Hearings, pp. 90-93).

The reason for a distinction between paid protection and free protection is apparent. Paid protection would be based upon contracts of insurance. Defendant might enter into such contracts or not so long as it conformed with the policy and purposes of the Act, namely, to provide "reasonable protection." Its action in accepting or rejecting an application for a contract of insurance in a specific case might be tested by something approaching normal standards of business judgment in the insurance industry (cf. *Fahey v. Mallonee,* 332 U.S. 245, 91 L.Ed. 2030, 67 S.Ct. 1552). No such standard was available to guide defendant in compensating damage already incurred.

Discretion in the acceptance or rejection of such claims would simply be an uncontrolled power in defendant's hands. This distinction between paid and free protection, explains why the members of the Senate Committee insisted that the free coverage must be mandatory.

The Danaher Amendment ultimately was abandoned and all future coverage after the July 1 deadline was required to be based upon policies of insurance to be issued for a premium. The attitude of the members of Congress with respect to the Danaher Amendment is, however, a substantial factor in guiding a court to the proper interpretation of the free protection provision later adopted.

3. THE ORIGINAL FORM OF THE AMENDMENT ADOPTING RETROACTIVE PROTECTION DEMONSTRATES THAT THE DUTY TO COMPENSATE WAS NOT LEFT TO DEFENDANT'S DISCRETION.

Retroactive coverage was first added to the bill in the House Committee. The language of the bill as reported out of the Committee unmistakably shows that the free protection was mandatory.

> "The Reconstruction Finance Corporation is authorized to and shall empower the War Damage Corporation to use its funds to provide, through insurance, reinsurance, or otherwise, reasonable protection against loss of or damage to tangible real property and tangible personal property which may result, or *may have resulted,* from enemy attack. Such protection *shall be made available* through War Damage Corporation upon the payment of such premium and subject to such terms and conditions as War Damage Corporation, with the approval of the Federal Loan Administrator, may establish. *Any such loss or damage sustained prior to the approval of this act * * * may be compensated by War Damage Corporation without requiring a contract of insurance or the payment of premium or other charge, and the loss may be adjusted as if a policy cover-*

ing such property was in fact in force at the time of such loss." (House Report No. 1752, p. 2).

It is perfectly clear that in this form the duty to compensate for loss or damage already incurred, as well as that which might occur in the future was mandatory and not permissive.

In the conference on the disagreeing votes of the two Houses, the form of the bill was recast so that the reference to compensation of losses during the free period was placed in a separate subsection (b). There is not a word in the legislative history to indicate that the general recasting of the statute at the last stage of its passage was intended to change its scope and effect.

D. Constitutional Considerations Require That Free Coverage Should Be Construed as Mandatory Rather Than Permissive if Such a Construction Is Reasonably Possible.

Defendant's contention that the free protection is merely permissive leads to an untenable result. If payment for the losses contemplated by the statute is mandatory there is no constitutional problem, for defendant has only to interpret and apply the statute. But if, as defendant argues, the statute is permissive with respect to the free period, then we think there is a violation of the constitutional prohibition against an uncontrolled delegation of power. It is readily apparent that the statute furnishes no guide by which defendant could test the propriety of compensating a particular loss already incurred. It is difficult to understand how any standard could be devised. Certainly no attempt was made to establish one.

Defendant suggests that the cases of *Bowles v. Willingham,* 321 U.S. 503, 88 L.Ed. 892, 64 S.Ct. 641, and *Yakus v. United States,* 321 U.S. 414, 88 L.Ed. 835, 64 S.Ct. 660, have eliminated the necessity of any standard to guide a federal agency (Def. Br., p. 63-66). In this connection, defendant relies particularly

upon Justice Roberts' dissent in the *Willingham* case, in which he complains that the court has virtually overruled *Schechter Poultry Corporation v. United States,* 295 U.S. 495, 79 L.Ed. 1570, 55 S.Ct. 837.

Justice Roberts' dissenting comments about the effect of the *Willingham* case are not law. The majority in that case did not deny the necessity of a standard. Neither has any other decision done so.

The case of *Fahey v. Mallonee,* 332 U.S. 245, 91 L.Ed. 2030, 67 S.Ct. 1552, does not aid defendant. The court there found a standard in well-settled practices in the industry. But what practice is there in the insurance industry or elsewhere which would guide defendant in accepting or rejecting claims for losses already incurred?

It is a well-settled rule that, if reasonably possible, a statute will be construed so as to avoid doubts about its constitutionality. *United States v. Shreveport Grain & Elevator Co.,* 287 U.S. 77, 82, 77 L.Ed. 175, 53 S.Ct. 42; *Screws v. United States,* 325 U.S. 91, 98, 89 L.Ed. 1495, 65 S.Ct. 1031. The constitutional question may be avoided here by holding that defendant's duty to compensate the losses covered by the statute is mandatory.

III. THE ALLEGED EXCLUSION OF VESSELS

Defendant claims that it had power to and did exclude vessels from the free protection granted with respect to losses already incurred. Defendant claims this power on the theory that the "general exceptions" clause gave it power to exclude vessels or other kinds of property from the *paid* protection which it was directed to set up for the future. And, defendant argues, it must have a similar power with respect to losses incurred during the free period before the paid plan went into effect.

A. Defendant Had No Power to Exclude Vessels or Other Kinds of Property from the Free Protection.

What we have already said in Section II of this brief about the mandatory nature of defendant's obligation to compensate losses during the free period foreshadows the answer to this claim of a power to make general exceptions applicable to such losses. If, as we have already shown, the *free* protection was mandatory, it follows that it is free of any power to make exceptions.

We think that defendant's basic premise, namely, that the "general exceptions" clause was intended to permit exclusions of *kinds of property* during the *paid* period is ill-founded. The legislative history demonstrates that the provision was added by the Senate Committee solely to permit area exclusions. Defendant, although conceding the original purpose and meaning of this provision (Def. Br., pp. 58-59), argues that, unknown to the Senators who had adopted the provision, the meaning changed because the House later added a somewhat similar provision of its own. The argument does violence to common sense.

It is sufficient, however, to point out that even if that argument were sound, defendant has failed to establish that the power with respect to the paid program was also applicable to the free coverage.

1. THE LANGUAGE OF SUBSECTION (b) DOES NOT SUBJECT THE FREE PROTECTION TO A POWER TO EXCLUDE KINDS OF PROPERTY.

Defendant's only argument to establish that this alleged power applied to the free coverage is the language of subsection (b):

> "subject to the *authorizations* and *limitations* prescribed in subsection (a), any loss or damage to any such property sustained subsequent to December 6, 1941, and prior to the date determined * * *."

Defendant argues that a *power* to make exceptions is an *authorization* to do so and, therefore, the free protection was made subject to a power to make exceptions. We think that the more natural referrals for *authorizations and limitations* are the monetary authorizations and geographical restrictions, respectively.

Defendant's argument leads to the absurd result that the protection granted by subsection (b) depends entirely upon what defendant might do under its claimed power to make exclusions. In other words, the *statutory* grant of free protection would have no fixed or definite scope but would fluctuate as defendant, from time to time, might revise its list of exclusions. The anomalous result is that defendant's administrative rulings would change the meaning of the statute itself.

No precedent exists for such a construction, and certainly an interpretation leading to such a freakish result will be avoided. The meaning of *authorizations and limitations* to which the free protection is subject is that they are the authorizations and limitations fixed in the statute itself. We find the "authorizations" in the monetary authorization and the "limitations" in the geographical restrictions established by the statute.

There was no reason why Congress should wish to make the free protection, as distinguished from the future paid protection, subject to a power to make exception. The losses in the past period were known and considered (Op. Br., p. 49).

2. A GRANT OF RULE-MAKING POWER IS NOT TO BE CONSTRUED TO AUTHORIZE RETROACTIVE APPLICATION.

The power which defendant claims is essentially legislative in character, i.e., a rule-making power. Legislative power ordinarily is prospective in nature and establishes rules for the future in contrast with a judicial power which declares rights on past facts under existing rules. *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 226 53 L.Ed. 150, 29 S.Ct. 67. It is a well-settled presumption that legislative power is intended only

to apply prospectively. *United States v. American Sugar Co.,* 202 U.S. 563, 577, 50 L.Ed. 1149, 26 S.Ct. 717; *United States v. St. Louis, etc. Ry. Co.,* 270 U.S. 1, 3, 70 L.Ed. 435, 46 S.Ct. 182; *Hassett v. Welch,* 303 U.S. 303, 314, 82 L.Ed. 858, 58 S.Ct. 559; 50 Am. Jur. 494-500. That principle is so firmly intrenched that if Congress had intended to permit retroactive rule making it would have said so explicitly. But all that defendant can point to in the language of the statute is the phrase "subject to the authorizations and limitations." Those words, as we have pointed out, are more naturally referred to the limitations imposed by the statute itself.

3. THE HISTORY AND PURPOSES OF THE STATUTE REFUTE THE CLAIM OF A POWER TO EXCLUDE KINDS OF PROPERTY FROM THE FREE PROTECTION.

Before Congress considered this law, defendant already had become obligated under the "blanket insurance policy," issued in the form of a press release, to compensate losses occurring in the United States. Certainly defendant had no power to make any exceptions to the protection there promised. It is also certain that Congress in confirming and extending that free protection did not intend to lessen the rights guaranteed by the press releases, yet defendant's argument necessarily imputes such an intent to Congress.

If Congress had any such intent, certainly there would have been some reference thereto. We found none, and defendant apparently has found none.

Moreover, such assertions as that of Chairman Steagall, that everybody was covered on everything *up to the time that the paid program would go into effect* affirmatively indicates that Congress had no idea that free protection was subject to defendant's power to exclude any kind of property (Op. Br., pp. 33, 42, 46, 47).

4. DEFENDANT'S LONG DELAY IN EXERCISE OF THE ALLEGED POWER TO EXCLUDE KINDS OF PROPERTY FROM THE FREE PROTECTION IS AN ADMINISTRATIVE CONSTRUCTION THAT IT HAD NO SUCH POWER.

Not until October 2, 1944, did the defendant purport to exercise the power which it now claims to exclude any class of property from protection during the free period. At that time the free period was well over two years past. Losses compensable during the free protection period had long since occurred; and, according to defendant's argument, it had long since been engaged in adjusting claims. If defendant in fact had the power which it claims, it certainly would have exercised it promptly, at least before it commenced consideration of claims.

Inaction is as truly an administrative construction as action. Failure to exercise a power in circumstances where it ordinarily would be exercised, if existent, is an administrative interpretation that the power does not exist. *F. T. C. v. Bunte Bros.*, 312 U.S. 349, 351, 352, 85 L.Ed. 881, 61 S.Ct. 58.

Defendant has suggested that its resolution of October 2, 1944, was nothing more than a "formalization" of earlier administrative practice (Def. Br., p. 57). This we deny. The evidence of such an "administrative practice" consists only of vague self-serving declarations that the resolution was merely declaratory of administrative practice. The evidence of the practice is dubious to say the least. There is no indication that defendant ever rejected a claim in reliance upon a purported authority to exclude any kind of property from the free protection. Certainly there was no "practice" with respect to vessels, for defendant states that only three claims, including plaintiff's, were presented (Def. Br., p. 5). At any rate the trial court made no finding of the existence of such an administrative practice, and in view of the evidence it scarcely could have done so.

Moreover, such a practice, if it existed, could not aid defend-

ant. Defendant contends that it had power to make "general exceptions" required by the statute to be approved by the Secretary of Commerce. A corporation acts through its board of directors. No such action was taken prior to October 2, 1944. The vague suggestions that the Secretary of Commerce acquiesced in these practices does not constitute the approval required by law.

If defendant's adjustors actually rejected any claims on such grounds, their action was arbitrary and does not establish administrative practice. It is only high-handed disregard of statutory duty and obligation.

B. The Exclusion of Vessels Was an Unreasonable and Arbitrary Act.

Even if defendant was empowered to exclude classes of property from the free protection, still the resolution of October 2, 1944, was void to the extent that it purported to exclude vessels.

In our Opening Brief (pp. 54, 55) we pointed out the lack of foundation for excluding vessels from the protection afforded property in general. What we said there, concerning the reasonableness of imputing to Congress an intent to exclude vessels, is equally applicable here.

On what theory is a vessel less deserving of protection than other forms of property? It was exposed to the greater risk and, as defendant has argued, the statute was primarily intended to cover the kinds of property exposed to the greatest risk. Neither can ships be said to fall in the class of property of doubtful utility such as furs or objects of art. Ships were more vital to the war effort and the public interest than any other property.

Defendant offers no argument to sustain the reasonableness of excluding ships except to say that it was consonant with de-

fendant's interpretation of the statute (Def. Br., p. 62). If defendant is right about the interpretation of the statute, it is immaterial whether defendant could or did exclude ships. But if the statute covers ships, then the whole basis of defendant's exclusion dissolves, for the exclusion plainly was made as an *interpretation* of the statute—not as an act of administrative discretion.

In the lower court defendant argued that the exclusions from the *free* protection made on October 2, 1944, must be reasonable because similar property was excluded from the *paid* protection at the outset of the program. The argument cannot aid defendant with respect to vessels for the statute itself excluded vessels during the paid program, but by an express amendment this limitation was removed from the free protection. Defendant's resolution of October 2, 1944, must stand on its own feet.

The particular circumstances in which the resolution of October 2, 1944, was adopted sufficiently refute any presumption of administrative regularity. In fact, it appears that the resolution was adopted in order to defeat a specific claim then pending—the Union Oil Company's claim for the loss of its tanker Montebello (Tr. 348, 367). A power to make "general exceptions" is not properly exercised as a veto over a specific claim.

We respectfully submit that the exclusion of vessels, made solely as an interpretation of the statute under the circumstances involved in this case, is arbitrary and unreasonable and should be rejected by the court as inconsistent with the statutory command to provide "reasonable protection."

It is familiar learning that the exercise of an administrative power is invalid if it bears no reasonable relation to the purpose for which it was authorized or if it creates arbitrary distinctions inconsistent with the purposes of the statute. *Thompson v. Consolidated Gas Corp.,* 300 U.S. 55, 69, 81 L.Ed. 510, 57

S.Ct. 364; *Manhattan General Equip. Co. v. Commissioner of Internal Revenue,* 297 U.S. 129, 134, 80 L.Ed. 528, 56 S.Ct. 397.

IV. THE ARGUMENT THAT DEFENDANT HAS NOT DETERMINED WHAT CONSTITUTES REASONABLE PROTECTION

Plaintiff alleged a loss as the result of the sinking of the Lahaina. It proved the "fair cash market value" of the property at the time of the loss by a stipulation (Tr. 60) and demands judgment for that amount as the "reasonable protection" assured by the law. But defendant argues that the measure of "reasonable protection" cannot be determined by a court—that it is a matter solely for defendant's administrative discretion (Def. Br., p. 75).

We fail to see why the courts that have already worked out by judicial decision the measure of "just compensation" should be helpless before the words "reasonable protection," particularly in view of the fact that subsection (b) directs defendant to "compensate" losses during the free period.

Doubtless it is true that if defendant had interpreted the term to prescribe some formula reasonably adapted to the purpose, a court would accept the interpretation. But that is not what defendant contends. Defendant has not pleaded any such interpretation or regulation establishing some lesser measure of "reasonable protection." It does not even argue that it has done so. It does not even claim that fair cash market value is not the appropriate measure. It does not even claim that in its administrative discretion it would determine upon a different measure.

This defendant simply claims that even though plaintiff is entitled to judgment, the court cannot give it because defendant has not yet acted. Plaintiff's claim was made almost 4 years ago. This suit has been pending more than 3½ years. Surely, if

defendant honestly believed that some formula less than fair cash market value was the appropriate measure of "reasonable protection," it would have acted to establish it.

The fact is that defendant long since has determined that "*actual cash value*" is the measure of reasonable protection. That was established at the outset of the paid protection plan (Tr. 49). We do not claim that this measure applies to free protection simply because it is one of the terms of the standard policy issued during the paid period. Rather, we contend that defendant cannot establish the measure of "reasonable protection" on an *ad hoc* basis. Having acted to establish "actual cash value" as the measure during the *paid* period, defendant has no power to establish a different measure for the *free* period.

This conclusion is affirmed by one of the provisions of the resolution of October 2, 1944, providing:

> "All property insured against war risks by insurers other than this Corporation be, and the same is excepted from protection under the said Act in any amount greater than the excess of the *fair cash value* of such property over and above the amount of such other insurance, whether collectible or not."

In the light of what defendant has already done, its claim that a court cannot determine the amount which constitutes "reasonable protection" is plainly without merit.

V. PLAINTIFF'S CLAIM WAS FILED AND SUIT WAS BROUGHT WITHIN THE TIME REQUIRED BY LAW

Defendant has revived some, but not all, of the arguments made in the court below to support its claim that plaintiff is barred by delay.

Since the federal statute prescribed no period of limitation, the California statute of limitations applies 28 U.S.C. Section

1652; *Campbell v. Haverhill,* 155 U.S. 610, 39 L.Ed. 280, 15 S.Ct. 217. The applicable California statute is Code of Civil Procedure, Section 338, prescribing a three year period for an action brought upon a liability created by statute. The statute was enacted March 27, 1942. This suit was filed March 22, 1945. Hence, if plaintiff's claim is barred, it must be by virtue of some regulation validly enacted by defendant.

It is not necessary to consider here whether defendant had the *power* to impose any time limitations, for defendant never did so.

A. The Limitations Claimed by Defendant to Be Applicable.

We turn now to the two sources upon which defendant relies to support its claim that plaintiff is barred by delay.

1. THE 12 MONTH TIME LIMIT ON SUITS, PROVIDED FOR IN THE TERMS OF THE STANDARD POLICY, DOES NOT APPLY.

Defendant points to the language in subsection (b) providing that losses during the free period were to be adjusted

> "as if a policy covering such property was in fact in force at the time of such damage."

This language, defendant argues, should be construed to refer to the standard form of policy, which defendant some months thereafter adopted, and to require that claimants under the free protection of subsection (b) comply with the terms of such policy. One of those terms is that suit must be brought within 12 months of the date of loss.

The fair implication of the quoted language is that Congress intended to create, between defendant and claimants under subsection (b), the same sort of rights and liabilities as would exist if a contract had actually been in existence. The terms

of the "as if" policy need no amplification beyond the provisions of the statute itself.

Even if defendant had power to prescribe the terms of this hyopthetical contract, it is plain that it did not do so. Nothing in the policies of insurance which defendant subsequently entered into suggested that their provisions were applicable to claims under the free period. No regulation of defendant made them applicable.

The absurdity of the argument is emphasized by another term of the standard policy which required proof of loss to be filed within sixty days. It is unthinkable that such a provision, in a policy issued more than six months after the loss, should be applicable to the free protection. Defendant pleaded this point and, in the court below, hinted vaguely that although plaintiff obviously could not be required to conform to this requirement, still plaintiff was bound by the "spirit" of the requirement and should have been required to file its claim as promptly as possible. Even this suggestion has been abandoned in defendant's brief on this appeal.

2. THE PRESS RELEASE OF DECEMBER 30, 1942 HAS NO LEGAL EFFECT.

Defendant argues that plaintiff is barred because it did not file its claim prior to February 1, 1943, as requested in a press release issued December 30, 1942.

Assuming that defendant had power to prescribe a time limit, our answer is that this press release did not require any such action and was not intended to serve that purpose.

It will be noted that the press release merely announces that defendant "* * * will investigate claims * * *" and that such claims "should be filed with the Washington office of War Damage Corporation on or before February 1, 1943." (57) On its face, the release is not a rule of law at all. It does no more

than urge prompt filing. There is no hint or suggestion that a claim will be barred, unless filed within that time. For the court's convenience, we have set forth the text of this press release in the Appendix. A brief examination, we think, will suffice to convince the court that it was not intended or competent to establish a time limit for filing claims under the free protection.

The remarkably short time—only one calendar month—allowed for filing claims, is further evidence that this press release was not intended to constitute a bar. If it was, we think that the time would have been unreasonably short.

The press release was not published in the Federal Register. Defendant states that the Federal Register Act did not *permit* publication, citing 44 U.S.C.A., section 305a (Def. Br., p. 77). The only basis which we have found for saying that publication was not permitted is a regulation providing that

> "No notices shall be published in the Federal Register, except those having general applicability and *legal effect* * * *."
>
> (1 C.F.R., Cum. Supp. Sec. 2.25)

We think defendant correctly concluded that the press release was a notice having no legal effect.

B. Defendant's Rejection of Plaintiff's Claim Without Referring to the Alleged Limitations Is Fatal to This Defense.

Plaintiff's claim was rejected by defendant in a letter which made no reference to the provisions of the standard form of policy or to the press release (6, 7). The fact that defendant ignored this very simple and clearcut ground upon which it might have rejected the claim if its present contention is true, is evidence that defendant's own interpretation was that neither applied. In this connection, it is significant that defendant was

entirely silent about its administrative practice, with respect to these alleged limitations. There is no suggestion that any claim under the free period was rejected on the ground that it was not prosecuted in the time specified in the standard policy or the press release. On the contrary, it would appear from Mr. Goodale's testimony that the *first* claim under the free period was not adjusted until February 1943 (319).

The failure to assert these technical defenses in rejecting plaintiff's claim has further significance. In *Oelbermann v. Toyo, K. K. Kaisha* (9 Cir. 1925) 3 F.2d 5, cert. den, 268 U.S. 693, 69 L.Ed. 1161, 45 S.Ct. 511, this court held that such defenses were waived by failure to assert them *in limine*.

Recognizing the authority of that decision, defendant seeks to escape it by arguing that under the rule of *Erie Railway Company v. Tomkins,* 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, the matter is governed by California law, and that in *Hubbard v. Matson Navigation Co.,* 34 Cal. App. 2d, 475, 93 P.2d 846, the California Court declined to follow the *Oelbermann* case. The point is not material. If California law governs, as defendant claims, then Insurance Code Section 554 is applicable:

> "§ 554. Waiver of delay. Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by an act of his, *or if he omits to make objection promptly and specifically upon that ground.*"

The provisions of this statute, expressly applicable to insurance contracts, rather than the general language of the *Hubbard* case, which involved a bill of lading, must control.

VI. THE REPEAL OF SECTION 5(g) IS IRRELEVANT

Apparently as an afterthought, counsel for defendant have appended to their brief an argument based upon the repeal of Section 5(g) of the Reconstruction Finance Corporation Act.* The contention is that plaintiff's claim for recovery is based upon that section and that its repeal is fatal to the claim.

Although the repeal was effected several months before judgment in the trial court,† this is the first hint of such a defense. In fact the argument deserves no more attention than it received.

It is not necessary to consider whether plaintiff's claim was one which Congress could not constitutionally destroy (cf. *Lynch v. United States,* 292 U.S. 571, 78 L.Ed. 1434, 54 S.Ct. 840), for it plainly appears that the repeal was not intended to affect pending claims.

Aside from constitutional limitations the effect of the repeal of a statute upon pending claims depends upon the intent of Congress 50 Am. Jur. 533. Where, as in the Portal to Portal Act,‡ Congress clearly intended to destroy pending claims the intent was given affect. *Seese v. Bethlehem Steel Co.* (4 Cir. 1948) 168 F.2d 58. On the other hand, repeal may simply have the effect of preventing the accrual of further claims. Thus, where the court found that Congress intended only to make the new rule effective as to the future, pending claims continued to be governed by the repealed statute. *United States v. Magnolia Petroleum Co.,* 276 U.S. 160, 72 L.Ed. 509, 48 S.Ct. 236.

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*Repealed by the Act of June 30, 1947, Pub. L. 132, 80th Cong., 61 Stat. 209.

†The case was tried on April 30, 1947. The statute was repealed June 30, 1947. The trial court's opinion was filed November 17, 1947.

‡Public Law 49, C. 52, 80th Cong., 1st Sess.; 29 U.S.C. Section 251.

In the present case it plainly appears from two considerations that Congress did not intend to destroy pending claims.

Title 1, U. S. C. Section 29, prescribes a rule of construction, sometimes described as a general saving clause, reading in part:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

Although this section has found its most frequent application in penal statutes, it is not so confined. Thus it has been held applicable to such diverse situations as the "liability" of a creditor who has received a preference under a repealed bankruptcy act, *Tinker v. Van Dyke,* (C. C. Mich. 1876) Fed. Cas. No. 14,058; *Warren v. Garber,* (C. C. Va. 1877), Fed. Cas. No. 17,196; *Bradberry v. Galloway,* (D. C. Cal. 1875), Fed. Cas. No. 1,764, to a taxpayer's "liability" to pay a tax imposed by a repealed statute. *Hertz v. Woodman,* 218 U.S. 205, 54 L.Ed. 1001, 30 S.Ct. 621, and to "liabilities" for unfair labor practices under the National Labor Relations Act (29 U.S.C. Section 151, et seq.) despite the new rule introduced by the Taft-Hartley Act (29 U.S.C. Section 141, et seq.) *National Labor Relations Board v. Mylan-Sparta Co.* (6 Cir. 1948), 166 F.2d 485.

The repealing act (61 Stat. 209) contains nothing to refute the application of Title 1 U.S.C. Section 29. The fact that the repealing act contains a saving clause does not preclude application of Title 1, U.S.C. Section 29. *Great Northern Railway Co. v. United States,* 208 U.S. 452, 52 L.Ed. 567, 28 S.Ct. 313. In fact, even without the aid of this general rule of construction, the repealing act itself reveals an intent not to destroy existing claims.

The statute which effected the repeal was a complete revision of the Reconstruction Finance Corporation Act. Even a casual reading of the statute shows that it was intended only to eliminate the historical oddities which remained from the war. The repeal of Section 5(g), which directed defendant to compensate war losses, cannot under these circumstances be taken as an indication of Congressional intent to destroy pending claims. In the light of the general policy declared in Title 1, U.S.C. Section 29, the conclusion is beyond reasonable doubt.

CONCLUSION

The plain meaning and basic policy of the statute brings vessels within the free protection. The legislative history demonstrates that this particular application of the law was explicitly recognized. Certainly, nothing in that history indicates a contrary intent. We submit that the plain meaning of the statute must prevail and defendant's principal argument, on which the trial court based its opinion, must be rejected.

With respect to the various affirmative defenses argued by defendant, we have shown that for obvious reasons Congress intended that compensation for losses occurring in the free period should be mandatory and that neither the letter nor the spirit of the law permits a construction which would make the free protection subject to any power to make exceptions. Moreover, defendant's purported exercise of the alleged power, by excluding vessels, cannot be supported on any rational basis.

We have shown that the fair cash market value is the appropriate measure of recovery and ask that the Court direct judgment for plaintiff in the principal sum of $615,000.00.

Dated: October 26, 1948.

Respectfully submitted,

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(Appendix Follows)

APPENDIX

Release. RFC-1718

THE SECRETARY OF COMMERCE
Washington

December 30, 1942.

Jesse Jones, Secretary of Commerce, today announced that War Damage Corporation will investigate claims for loss of property in transit between any points located in the United States, and the Canal Zone, and the Territories and possessions of the United States with the exception of the Philippine Islands. All claims for loss of property in transit between such points which resulted directly from enemy attack between December 6, 1941, and July 1, 1942, should be filed with the Washington office of War Damage Corporation on or before February 1, 1943. Investigation of such claims will be conducted in accordance with the provisions of Section 5g of the Reconstruction Finance Corporation Act, as amended.

All claimants are notified that, notwithstanding the investigation, War Damage Corporation reserves the right, in accordance with the statute and the regulations issued thereunder, to determine whether or not the corporation is liable.